JD(ATL)-68-03
Fayetteville, NC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PEPSI-COLA BOTTLING CO. OF FAYETTEVILLE, INC.

and **CASE 11-CA-14889**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204 AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Ronald Morgan, Esq.
for the General Counsel.
Thomas Budd (Clifton, Budd & DeMaria),
For the Respondent.

SECOND SUPPLEMENTAL DECISION

This matter was heard in Fayetteville, North Carolina on August 13, 2003. I have considered the full record[1] including briefs filed by Respondent and General Counsel in reaching this decision.

PRIOR ACTION

As explained by Administrative Law Judge Robert C. Batson in a supplemental decision,[2] the United States Court of Appeals for the Fourth Circuit entered a judgment enforcing in material part a December 16, 1994 decision by the National Labor Relations Board. Administrative Law Judge Batson's supplemental decision dealt with compliance issues resulting from that judgment. On March 24, 2000 the Board issued a

[1] Respondent filed a motion on August 29, 2003 to reopen record and introduce additional evidence. Counsel for General Counsel opposed on grounds the additional evidence is not relevant. However, Respondent argued that the additional evidence tends to support its argument that the NLRB unduly delayed prosecution of this matter and prejudiced its ability to offer evidence in support of that position. I grant Respondent's motion and receive Exhibits A and B.

[2] See 1998 WL 1984870 (N.L.R.B. Div. of Judges).

decision in review of Judge Batson.[3] Subsequently, United States Court of Appeals for the Fourth Circuit entered a judgment[4] in which it remanded material aspects of that compliance matter to the Board.

The Board accepted the remand. The matter was assigned to me for hearing due to the unavailability of Judge Batson.[5]

ISSUE:

The matter at issue involved Christopher Hyatt and whether he is entitled to backpay from the time a job, which he held with a Coca-Cola bottling company in Fayetteville, North Carolina[6] ended. Hyatt's job with Coca-Cola ended on November 21, 1995. General Counsel claimed that Hyatt is entitled to backpay from his unlawful discharge by Pepsi until Pepsi reemployed Hyatt in a substantially equivalent job on May 12, 1997. Counsel for General Counsel thereby argued to the effect that Hyatt's termination at Coca-Cola should not influence his backpay entitlement.

Pepsi has paid Hyatt backpay for the period from his discharge until the date his Coca-Cola job ended. Therefore, the only backpay at issue involves the period from Hyatt's November 21, 1995 termination from the Coca-Cola job, until May 12, 1997 when he was fully reinstated by Respondent.

In its remand the Fourth Circuit held:

> *It is clear that an individual's backpay entitlement ends when that individual would have otherwise been terminated from employment in a legally permissible manner. (Case citation omitted). Thus, if at the time he failed the Coca-Cola drug test, Hyatt would have failed the Pepsi drug test, and if Pepsi had a policy of terminating individuals who fail a drug test, Hyatt would have been properly terminated by Pepsi on that date, and Pepsi's backpay liability should end at the time he would have been legitimately terminated from Pepsi.* [7]

The Evidence:

The parties stipulated that Christopher Hyatt worked for the material interim employer –(i.e. Coca-Cola) – from February 28, 1994 until November 21, 1995.

Hyatt testified that he worked for Coca-Cola as a route salesman driving an eight-bay or a sixteen-bay tractor-trailer truck. Coca-Cola had a drug testing policy. Hyatt tested negative on two Coca-Cola drug tests. One test was pre-employment and the other was given during his Coca-Cola employment. Hyatt was randomly selected for that second test.

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3 330 NLRB 1043 (2000). Also cited at GCExh. 1(a).
4 258 F.3d 305 (4th Cir. 2001). Also cited at GCExh. 1(b).
5 GCExh. 1(e) and 1(f).
6 An interim employer which is referred to herein as Coca-Cola
7 258 F.3d 305, 313-314 (4th Cir. 2001).

The material dispute arose as a result of Hyatt testing positive when given a third drug test by Coca-Cola. Hyatt testified that the papers he was given preparatory to that test showed several blanks[8] under the heading "Reason for Test." Those reasons were listed as pre-employment, random, reasonable suspicion/cause, post-accident, promotion, return to duty, follow-up and other. Hyatt testified that "other" was checked.[9] He tested positive to that drug test and his job ended.[10] When asked, "And for what drugs did you test positive," Hyatt answered, "For marijuana."

Hyatt was asked if he smoked marijuana the day before or two days before he took the November 1995 drug test at Coca-Cola and he answered, "Yeah, I might have smoked marijuana one time, yeah."

About a month after returning to Pepsi in a substantially equivalent job on May 12, 1997 Hyatt was randomly tested for drugs. He testified that he passed that test. Four or five weeks later Hyatt was given another drug test. He tested positive and was terminated. Hyatt testified that he was not told why he failed that test.

Respondent's director of safety and loss prevention, Bill Peterson, testified that Pepsi has had a drug-testing program in effect since 1989. The policy, called the controlled substance abuse policy, is explained at pages 18 and 19 of the employee handbook.[11] The policy required the immediate discharge of any driver that tested positive for drugs. Additionally, it was Pepsi's policy to immediately discharge any driver that was charged with Driving while Intoxicated (DWI). Moreover, according to Peterson, Pepsi immediately discharged anyone upon learning that person had tested positive in a drug test conducted by someone other than Pepsi and Respondent dismissed anyone that it learned had engaged in off the job use of illegal drugs. Peterson testified that it was also Pepsi's policy to discharge anyone charged with illegal drugs and that a former employee named David Burns was discharged when Peterson learned through a newspaper that Burns had been charged with purchase and use of an illegal substance.

Peterson identified Respondent's alcohol and controlled substance random testing procedures.[12] Those procedures call for the testing of 50% of Respondent's DOT drivers each year. Peterson testified that Pepsi also tested 50% of its other drivers that did not qualify as DOT. It was Respondent's policy to immediately discharge and thereafter to refuse to consider for future employment, any driver that tested positive on a drug test. That policy of no future employment extended to anyone that tested positive on a test administered by someone other than Pepsi.

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8 GCExh. 2.

9 However, Hyatt testified that he was given the Coca-Cola test in November because he had agreed to accept advancement to a management position. He further testified that when he worked at Pepsi before being illegally discharged, Pepsi did not administer drug test when employees changed jobs.

10 There was a question of whether Hyatt quit his job at Coca-Cola in lieu of discharge. That issue was discussed by the Circuit Court and is immaterial to these proceedings.

11 See RExh. 2.

12 RExh. 3.

Randy Kennedy is Respondent's regional sales manager. At material times he was Respondent's general manager or plant manager in Fayetteville. He testified in corroboration of Bill Peterson. Kennedy also testified that he was aware that a driver for Pepsi named Tommy Swanson was charged with DWI but was not discharged. Kennedy testified that Swanson drove a pick-up truck that was a Pepsi identified vehicle but he was unsure as to whether Swanson was qualified to drive a Pepsi route truck.

Richard French testified after being called by General Counsel. He worked as a bulk salesman and sometime drove a truck for Pepsi from March 1992 until November 1998. French was subject to Pepsi's random drug tests. He was tested on two occasions during his employment with Respondent. He tested negative on those tests. Although French had an accident that resulted in his being out of work for six months, he was not tested for drugs on that occasion.

Conclusions:

Credibility:

The findings herein were in large measure not in dispute. I have made credibility determinations under "Findings:" in disputed situations.

Findings:

The Circuit Court set out the matters at issue:

> *"Pepsi argues further that the ALJ committed clear legal error in not allowing Pepsi to inquire into Hyatt's apparent failure of a drug test at Pepsi following his reinstatement, and to inquire generally into the nature of Pepsi's drug testing policies during the relevant period. It may be that Pepsi had a drug testing regime similar to that of Coca-Cola at the time Hyatt failed the Coca-Cola drug test; the ALJ's emphatic rejection of Pepsi's attempt to inquire into Hyatt's later alleged failure of a Pepsi drug test, following his reinstatement, clearly would be interpreted by a reasonable litigant as foreclosing such a line of inquiry. Yet information regarding Pepsi's drug testing program was of great relevance to this case. It is clear that an individual's backpay entitlement ends when that individual would have otherwise been terminated from employment in a legally permissible manner. (Case citation omitted). Thus, if at the time he failed the Coca-Cola drug test, Hyatt would have failed the Pepsi drug test, and if Pepsi had a policy of terminating individuals who fail a drug test, Hyatt would have been properly terminated by Pepsi on that date, and Pepsi's backpay liability should end at the time he would have been legitimately terminated from Pepsi. We thus conclude that it is necessary to remand for additional factual findings regarding the nature of Pepsi's drug testing policy during the relevant period."*

In sum the Court held, among other things:

> *We deny enforcement on the present record and remand, however, for further development of the record regarding Pepsi's drug testing policies, and the circumstances of Hyatt's failure of the Coca-Cola drug test insofar as they bear*

on the question of whether Hyatt would have failed a Pepsi drug test and been terminated by Pepsi for this reason at some point[13] *had he not been terminated earlier by Pepsi in violation of the Act.*

Therefore, I shall consider the evidence as to the following issues raised by the Circuit Court:

(1) Did Pepsi have a drug-testing regime similar to that of Coca-Cola at the time Hyatt failed the Coca-Cola test?
(2) Did Pepsi have a policy of terminating individuals who failed a drug test?
(3) Would Pepsi have tested Hyatt at the on the same date that he was testedby Coca-Cola?[14]

Did Pepsi have a drug-testing regime similar to that of Coca-Cola at the time Hyatt failed the Coca-Cola test?

The record did not include specifics as to the actual tests administered by Pepsi or Coca-Cola in 1995. However, there was evidence showing why Pepsi and Coca-Cola administered drug tests, the percentage of drivers tested each year by Pepsi, and the illegal substances outlawed by Pepsi and Coca-Cola. From the standpoint of this matter, it does appear that both Pepsi and Coca-Cola tested for similar illegal substances and, if Hyatt had been working for Pepsi on November 21, 1995 and had been tested, he may have failed the Pepsi test as he did the Coca-Cola test. I credit all testimony that supports that conclusion including especially Hyatt's testimony that he tested positive to marijuana[15] and his admission that he had used marijuana at a time proximate to that test.[16]

Did Pepsi have a policy of terminating individuals who fail a drug test?

There was no dispute but that Respondent had a policy of terminating individuals that failed a drug test. Respondent's handbook as well as the full record shows that it terminated employees that failed drug test during November 1995.

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13 The Court in a footnote at this location stated, "If Pepsi indeed had a drug testing policy similar to Coca-Cola's, and likely would have terminated Hyatt for failing such a test, it still may be the case that Pepsi would not have tested Hyatt at exactly the same time Coca-Cola did; for example, perhaps Coca-Cola tests monthly while Pepsi tests only every three months. Hyatt's backpay entitlement ends only when and if Pepsi likely would have tested him, he likely would have failed, and Pepsi likely would have validly terminated him."

14 The Court in a footnote at this location stated, "If Pepsi indeed had a drug testing policy similar to Coca-Cola's, and likely would have terminated Hyatt for failing such a test, it still may be the case that Pepsi would not have tested Hyatt at exactly the same time Coca-Cola did; for example, perhaps Coca-Cola tests monthly while Pepsi tests only every three months. Hyatt's backpay entitlement ends only when and if Pepsi likely would have tested him, he likely would have failed, and Pepsi likely would have validly terminated him."

15 I do not credit Hyatt's testimony to the extent it tends to show that medication rather than marijuana caused his positive drug test at Coca-Cola.

16 Both Coca-Cola and Pepsi 1995 policies included marijuana as an illegal substance.

General Counsel argued Respondent's evidence in that regard was compromised by the admission of Randy Kennedy that Pepsi retained an employee after that employee was convicted of driving while intoxicated. In that regard I agree with Counsel for General Counsel to the effect that Respondent did not strictly follow its no-tolerance policy as it claimed. However, despite that evidence the record does show that Respondent consistently discharged employees that tested positive for use of illegal substances and that is the overriding issue herein. In that regard the record showed that Coca-Cola terminated Hyatt because he failed a drug test and that Respondent also terminated employees that failed a drug test in 1995. Moreover, Hyatt admitted he tested positive to marijuana and he had used marijuana shortly before his test. The Pepsi policy was to discharge employees that tested positive to marijuana.

I find that substantial evidence[17] proved that Pepsi did terminate employees that tested positive to marijuana in 1995.

Would Pepsi have tested Hyatt on the same date of his test by Coca-Cola?

Respondent, in its brief, argued that Hyatt would have been as likely to be tested by Pepsi if he had been employed by it in November 1995, as he was by Coca-Cola. It based its argument on evidence that both it and Coca-Cola were testing under the same mandate from the United States Department of Transportation and that both its practice and the Coca-Cola practice was to randomly select drivers for testing.

As to that argument, the evidence shows that Coca-Cola did not randomly select Hyatt for testing in November 1995. He was selected because he agreed to a promotion. Secondly, there is no logical rationale behind Respondent's argument. The premise alleged by Respondent that Hyatt was actually selected for a test by his November 1995 interim employer, does not lead a reasonable person to conclude that therefore Hyatt would have been tested at the same time if he had been employed by Pepsi using its random selection process. Moreover, if the Court had adopted Respondent's argument there would have been no reason for it to remand the matter of Hyatt's backpay after November 21, 1995. Under Pepsi's rationale the Court would have simply determined that Hyatt would have been tested at the same time he was tested at Coca-Cola, that he would have tested positive in that test, that Pepsi would have discharged him at that time and there was no need for a remand. I find that argument by Respondent is not persuasive.

Nevertheless, I shall consider whether there is evidence, which would show that Respondent would have tested Hyatt when Coca-Cola tested him.

As shown above, Pepsi and Coca-Cola administered their respective drug tests for several reasons, including random testing. Also as shown above, while working for Pepsi and Coca-Cola Christopher Hyatt was subject to random testing, pre-employment testing and testing marked as for "other." The evidence showed that Pepsi administered

[17] **Universal Camera Corporation v. N.L.R.B.**, 340 U.S. 474 (1951).

random drug tests to at least 50% of its drivers each year. The specific driver tested was randomly selected through a computer program.

General Counsel argued that Hyatt would not have taken a drug test on or shortly before November 21, 1995, if he had continued working for Respondent, because Respondent did not test its employees whenever employees changed jobs.[18]

I find that the question of whether Hyatt would have been tested because of a job change is not material to the issues herein. The material question is if Hyatt had continued working for Pepsi, would Pepsi have tested Hyatt for any reason, at the time he was actually tested by Coca-Cola.

As to that question the record does not show the specific dates during 1995, in which Respondent administered tests for drugs. Moreover, the record did not show how the date or dates for testing was or were selected.

Additionally, the record failed to show whether the test dates were randomly selected.[19] Moreover, even if there was evidence that the dates were randomly selected, the chance that Christopher Hyatt would have been selected for testing if he had continued in Pepsi's employment, would have been remote. An investigation into the chances Hyatt would have been selected on or shortly before November 21, 1995 would include determining the likelihood that since 50% of the drivers would have been tested at some time during 1995, what were the chances that one particular driver would be tested on a specific one, two or three of the workdays.

If I assume for the sake of discussion that Respondent employed 20 drivers during that year and if the testing days were randomly selected then I could assume that 10 drivers would have been tested during the year. If those drivers were selected for testing on fixed dates equidistant apart, one driver would have been tested every 26th day. The chance that a particular one of those 20 drivers would have been tested on a day in November would be about 5%. Of course, there would be an increased unlikelihood that the testing date would fall on or within 2 days of November 21.

The record also failed to show whether Respondent conducted any drug test, which may have included Christopher Hyatt, had he continued working for Pepsi, on or shortly before November 21, 1995.

Moreover, despite the fact that chances are heavily against Hyatt being tested for drugs if he had continued working for Pepsi until November 21, 1995 the record does not show any basis for my making the above assumptions. Although there was a showing that Respondent selected employees for testing on a quarter annual basis and the drivers were selected in such a manner that Respondent would have tested at least

[18] As shown herein it is undisputed that Coca-Cola tested Hyatt on November 21 because he agreed to a job change. That change was to involve Hyatt moving into a management position.

[19] Employees were randomly selected for drug tests but there was no showing that the dates for the tests were randomly selected.

50% of its drivers during the full year,[20] there was no evidence that would enable me to calculate the probability that any of Respondent's drivers would have been tested at a time proximate to Hyatt's November 21, 1995 termination at Coca-Cola. There was no showing that Respondent randomly selected the dates for testing; and there was no showing that Respondent selected any drivers for testing within 2 days of November 21, 1995.

As shown above in footnote 13, the Court stated,

> *"If Pepsi indeed had a drug testing policy similar to Coca-Cola's, and likely would have terminated Hyatt for failing such a test, it still may be the case that Pepsi would not have tested Hyatt at exactly the same time Coca-Cola did; for example, perhaps Coca-Cola tests monthly while Pepsi tests only every three months. Hyatt's backpay entitlement ends only when and if Pepsi likely would have tested him, he likely would have failed, and Pepsi likely would have validly terminated him."*

There was no evidence that Respondent tested any drivers for drugs on or within two days before November 21, 1995 and the record failed to show that Respondent would have tested Hyatt during that 3 day period.

Respondent defenses:

Respondent also argued that several additional factors should result in disqualifying Hyatt for backpay during the contested period. It argued that it discharged employees for failing tests other than tests by Pepsi and in view of Hyatt failing a test by another (i.e., Coca-Cola), it has proved he would have been fired by Pepsi on November 21, 1995. Respondent offered testimony from Bill Peterson[21] and documents including its employee handbook to show that it discharged employees on learning from outside sources[22] that the particular employee had used an illegal substance. Respondent pointed to situations involving employees David Burns and Tommy Swanson. However, as to Hyatt, there was no evidence that Respondent learned at any

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[20] General Counsel argued that I should credit testimony showing that Respondent did not actually test 50% of its drivers annually. However, I do not credit that testimony. Instead I credit the evidence showing Respondent was required by DOT to test 50% of its qualified drivers and that it did in fact test a minimum of 50% of both DOT drivers and other drivers each year.

[21] Respondent argued in its brief that it discharged employees for off the job drug use. Actually its witness in that regard, Bill Peterson, testified that he recalled only one instance of illegal drug use off premises and that individual was terminated. As shown below I do not credit Peterson's testimony to the extent it conflicted with Respondent's written policies (see RExh. 2). Specifically, I do not credit Peterson to the extent his testimony may tend to show that Respondent had a strict policy of always terminating employees for off the job drug use.

[22] Despite Respondent's argument that it strictly enforced a policy of discharging employees alleged to have used illegal drugs whether on or off the job, its written substance abuse prevent program (see RExh. 2, p. 18, 19) shows only that an employee may be subject to disciplinary action up to and including termination for off the job illegal drug use or being under the influence of drugs which could adversely affect job performance, jeopardize the safety of others or Company interest (emphasis added). I credit the evidence showing the policy was as shown in Respondent's records including RExh. 2, and I do not credit testimony which may tend to show that Respondent's policy was more strict that shown in those records.

time before May 12, 1997 that Hyatt had failed a drug test at Coca-Cola in November 1995 and, of course, there was no showing how Respondent could have discharged Hyatt without knowledge he had failed a drug test.

Next Respondent argued that Hyatt, by admittedly using marijuana on or about November 21, 1995 admittedly engaged in a dischargeable offense at Pepsi.

The Board has held that while discharge by an interim employer without more, does not establish willful loss of employment, an employer may establish willful loss by showing the discharge resulted from deliberate and gross misconduct which is so outrageous that it suggests deliberate courting of discharge. See ***Cassis Management Corporation***, 336 NLRB No. 90 (2001); ***Minnette Mills, Inc.***, 316 NLRB 1009 (1995).

The Board considered whether Coca-Cola terminated Hyatt for deliberate or gross misconduct in its underlying decision.[23] There the Board found that Hyatt was terminated at Coca-Cola because he tested positive during a November 1995 drug test. The Board found that did not constitute deliberate or gross misconduct.

Moreover, in its decision in this matter the Fourth Circuit considered Respondent's argument that "Hyatt was discharged from at least one interim employer <u>*because of his use*</u> of illegal drugs, thereby incurring a willful loss of interim earnings."[24] (258 F.3d 305, 312; emphasis added) The Court held that,

> *"Pepsi had a full opportunity to question Hyatt regarding the circumstances surrounding his discharge from Coca-Cola and could have subpoenaed documents and witnesses to further develop the record regarding the circumstances of his discharge but produced no evidence other than the bare fact that Hyatt failed a drug test. The record does not reflect, for example, whether Hyatt used drugs in temporal proximity to his working hours, what kind of substances Hyatt may have consumed, or whether Hyatt's conduct ever evidenced the kind of workplace intoxication that could endanger himself or others. On these facts, the NLRB's conclusion that the record does not support a finding of moral turpitude is not unreasonable."*

Here, the situation is not substantially different. Even though Hyatt admitted that he used marijuana, the fact remains; he was terminated at Coca-Cola because of his drug test. As shown above in ***Cassis*** and ***Minnette Mills*** the question in deliberate and gross misconduct cases refers back to the reason for the employee's discharge by the interim employer. Here, that would involve a consideration of why did Coca-Cola discharge Hyatt and the Board found the answer to that question. It held that Hyatt was terminated from Coca-Cola for testing positive on his November 1995 drug test. He was

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[23] 330 NLRB 1043 (200).

[24] Therefore, the Court considered actual drug use as opposed to failure of a drug test, as the grounds for discharge.

not discharged because he actually used marijuana. Nor was he discharged because he admitted using marijuana.[25]

The Circuit Court used a different analysis. As shown above, the Court did consider whether an interim employer discharged Hyatt because of his use of illegal drugs. Among other things, the Court found,

> *(t)he record does not reflect, for example, whether Hyatt used drugs in temporal proximity to his working hours, what kind of substances Hyatt may have consumed, or whether Hyatt's conduct ever evidenced the kind of workplace intoxication that could endanger himself or others.*

Of the three points specified by the Court, Respondent has shown only that Hyatt consumed marijuana. Despite its knowledge of what the Circuit Court had said regarding misconduct and moral turpitude, Respondent failed to prove that Hyatt used drugs in temporal proximity to his working hours or that Hyatt's conduct ever evidenced the kind of workplace intoxication that could endanger himself of others.

I find that Respondent failed to prove that Hyatt engaged in misconduct, which constituted a willful loss of interim earnings.

Respondent's final argument is that both the General Counsel and the Board unduly delayed bringing this action, that the delay prevented its fully developing the record and this action should be dismissed. It stated that "nearly two years have inexplicably passed since the Fourth Circuit's instruction for further development of the record regarding Hyatt."[26]

Respondent Exhibit 1 showed that Respondent subpoenaed Coca-Cola on July 22, 2003 and Coca-Cola responded that it destroyed records of Christopher Hyatt five years after his termination and RExh. A and B, showed that Respondent subpoenaed LabCorp, Inc. on July 22, 2003 and LabCorp, Inc. responded on August 11, 2003 that the subpoenaed records had been destroyed. There was no evidence that Respondent tried to acquire Coca-Cola and LabCorp, Inc. records from the time of the Circuit Court July 25, 2001 remand until July 22, 2003.

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[25] An examination of the Coca-Cola drug policy (RExh. 1) and Pepsi's drug policy (RExh. 2) illustrated that both employers used drug tests to determine if an employee had used illegal drugs. Therefore, the results of a positive test would be the same as an admission. Both would illustrate the use of illegal drugs.

[26] The United States Court of Appeals, Fourth Circuit, heard arguments on May 8, 2001 and remanded a portion of the matter to the Board on July 25, 2001. The Board then issued a May 14, 2003 order accepting the Court's remand and referring the matter of Hyatt's backpay to the chief administrative law judge. I was designated to hear this matter by order dated May 27, 2003 and this matter was heard in Fayetteville, North Carolina on August 13, 2003. Those facts reflect that the longest delay in the proceedings occurred between the Court's July 25, 2001 remand and the Board's May 14, 2003 acceptance of the remand.

Respondent argued that General Counsel unduly delayed during the 1997 hearing by objecting to its questions regarding the Coca-Cola and Pepsi drug policies. Administrative Law Judge Batson sustained General Counsel's objection. During 2001 the Fourth Circuit found that the Judge's ruling was improper. Respondent argued that Judge Batson's ruling unfairly foreclosed development of the record by prejudicing its ability to prove its position that Hyatt's backpay should have been cut off when Coca-Cola terminated him. Respondent argued that the Judge's ruling made relevant evidence more difficult to retrieve particularly in view of its total change in management[27] and that entities subpoenaed in this matter – Coca-Cola and LabCorp, Inc. – have both indicated that the information sought has been destroyed. Respondent cited RExh. 1 and 7 (see Respondent post hearing exhibits A and B) to support that second argument.

Respondent failed to offer evidence showing when LabCorp, Inc. destroyed Hyatt's records but it is apparent from RExh. 1, that Coca-Cola destroyed its Hyatt records five years after November 21, 1995. Therefore, some if not all, of the records were available at the time of the Judge Batson hearing and there was no evidence that Respondent attempted to acquire any of those records at that time.[28]

As shown above, I found that Pepsi and Coca-Cola did have similar drug-testing regimes and Respondent had a policy of terminating individuals that failed a drug test. It would have been in regard to those two issues that the subpoenaed records would have been relevant. Therefore, it was not necessary for Respondent to submit documents subpoenaed from Coca-Cola and LabCorp to support those arguments and it was not prejudiced by alleged undue delay.[29]

Respondent cited ***TNS, Inc. v. NLRB***, 296 F.3d 384 (6th Cir. 2002). There the Court acknowledged that denial of enforcement solely on the basis of undue delay is inappropriate. However, the Court held it was unreasonable to hold an employer responsible for damages incurred over an extended period of time, especially when, as here, its structure and business changed in the interim.

Here, the damages were not incurred over an extended period of time resulting from the alleged undue delay. Instead, as shown above, the parties agreed that Hyatt's backpay entitlement ended no later than May 12, 1997 when Pepsi fully reinstated him. Therefore proceedings after May 12, 1997[30] had no effect on Hyatt's backpay entitlement. Additionally, the record failed to show that Respondent has changed its

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27 Despite Respondent's argument regarding change in its management, the record does not fully support its allegations in that regard.

28 Respondent was aware of Hyatt's interim employment with Coca-Cola and the facts surrounding his termination by Coca-Cola, during or before the Judge Batson hearing on September 24 and on October 16, 1997. There was no showing that Respondent was prevented from seeking records material to Hyatt's November 1995 Coca-Cola termination before, during or soon after that hearing.

29 The subpoenaed records are not relevant to the sole remaining issue (i.e., Whether Pepsi would have tested Hyatt at the same time he was tested by Coca-Cola).

30 Including the 1997 hearing before Judge Batson.

structure and business in the interim to the extent Respondent alleged in its brief and I cannot consider arguments that are not supported by record evidence.[31]

On these findings and on the entire record, I issue the following recommended:

ORDER

The Respondent, Pepsi-Cola Bottling Company of Fayetteville, Inc., its officers, agents, successors and assigns, shall:

> Pay to Christopher Hyatt backpay from November 21, 1995 through May 12, 1997 as previously calculated in the decision of Administrative Law Judge Robert Batson (1998 WL 1984870 (N.L.R.B. Div. of Judges)) plus funds from Hyatt's profit sharing and/or retirement benefits.

Dated, Washington, D.C.

Pargen Robertson
Administrative Law Judge

[31] In that regard Respondent pointed to GCExh. 1(h). However, that exhibit is "Employer's Response to Judge Pargen Robertson's Order to Show Cause, Dated June 4, 2003," and does not constitute probative evidence.